

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4718 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DIVYABEN U. VYAS

Versus

STATE OF GUJARAT

Appearance:

MR PV HATHI for Petitioner
MR NIGAM SHUKLA for the Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 07/08/96

ORAL JUDGEMENT

1. The petitioner, a Section Officer in the Building and Communication Department of the Government of Gujarat, filed this Special Civil Application before this Court in which challenge is made to the action of the respondent to supersede her in the matter of promotion to

the post of Under Secretary and consequent promotion to the next higher post of Deputy Secretary and Joint Secretary.

2. The petitioner was appointed by recruitment on the post of Assistant through Gujarat Public Service Commission which post she joined on 1-1-1962. In the year 1966, the petitioner was selected as direct recruitee in the higher cadre of Section Officer. She passed the requisite examination in the cadre of Section Officer at the first trial and was given a prize of Rs.50/-.

3. Vide communication dated 10th August, 1976, the petitioner was communicated with the adverse remarks for the period commencing from 1-8-1975 to 31-3-1976. The petitioner made a representation against the adverse remarks on 12-11-1976. The representation came to be rejected on 7-1-1977. The petitioner demanded of the reasons which persuaded the authority to reject her representation against the adverse remarks, but she was not given those reasons.

4. Under the communication dated 24th August, 1978, the petitioner was served with the adverse remarks for the period from 1-9-1977 to 31-3-1978. The petitioner made a representation immediately, but that has been rejected under the communication dated 11-6-1979. The adverse remarks were communicated for the period commencing from 1-4-1978 to 31-3-1979 under the communication dated 19-7-1979. The petitioner sought for information before making of the representation against these remarks, but the grievance of the petitioner is that it was treated to be a representation of her and it has been rejected. The petitioner, as per her case, was due for promotion to the post of Under Secretary in the year 1978. Her first junior ranking at Sr. No.130-D in the seniority list, Smt. B.K. Zaveri came to be promoted under the order annexure 'G' dated 27-10-1978. The petitioner made an application on 22-3-1982 giving therein the details about the injustice done to her in the matter of promotion on the post of Under Secretary. In this the grievance has been made that deliberately one officer had spoiled her service record. The name of that officer was given to be M.D. Chaniara, but the Special Officer of the department under its order dated 1-5-1982 communicated to the petitioner that there were no justifiable grounds to cancel the adverse remarks communicated to her earlier.

5. The petitioner submits that on and from 1978 more

than 130 persons junior to her came to be promoted to the post of Under Secretary superseding the claim of the petitioner. Under the order dated 13-8-1982 some more juniors of the petitioner came to be promoted as Under Secretary and the copy of this order has been submitted as Annexure 'K'. This supersession has been challenged by the petitioner by this Special Civil Application.

6. This Special Civil Application has been amended by the petitioner. After filing of this Special Civil Application, the petitioner was promoted as Under Secretary on 1-7-1983 (wrongly written 1st July, 1993) and to the next higher post of Dy. Secretary on 16-4-1988. The grievance has been made, by amendment, that in case the petitioner would have been given the timely promotion to the aforesaid two posts then by now she would have been promoted to the post of Joint Secretary. The second grievance made by the petitioner in this Special Civil Application is that not permitting her to cross efficiency bar from due date i.e. 1-10-1976 is illegal. Under the notice dated 14-2-1977, the petitioner was called upon to show cause why she should not be allowed to cross the efficiency bar. Reply filed, but the same was rejected under the order dated 30th May, 1977. Her claim for crossing of the efficiency bar from 1-10-1977 has also been rejected. For subsequent year she was also not allowed to cross the efficiency bar. The petitioner submits that from 1-10-1980 she has been allowed to cross efficiency bar under the order dated 9-1-1981. The prayer has been made for allowing her to cross the efficiency bar from 1-10-1976. The petitioner has challenged the adverse remarks also in this Special Civil application.

7. The respondent filed a reply to the Special Civil Application and petitioner filed a rejoinder thereto. In the reply the respondent has come up with a case that in addition to the adverse remarks in her service record, the petitioner had two other serious adversities in her service record. She was punished with the penalty of censure for the misconduct under the order dated 15th March, 1979. Again under the order dated 16th April, 1979 she has been punished by way of penalty of withholding of grade increments for three months on a proved misconduct. The respondent has filed the copy of those orders of the penalties enclosed to the reply as annexure '3' and '4'.

8. The petitioner filed a rejoinder to the reply filed by the respondent and she has denied these facts.

9. The learned counsel for the petitioner admits that there is no dispute that the petitioner has been given the aforesaid penalties. He further admits that the petitioner has not challenged those orders before the appropriate departmental authority or any other forum.

10 The learned counsel for the respondent contended that the petitioner has suppressed these material and relevant facts from this court. By suppressing this fact she was able to get the order of issue of rule from this court. Not only this, but she was able to get the interim relief also in her favour. Shri Shukla contended that on this ground alone, this court may not go on the merits of the case and dismissed the same only on this ground. On merits also, the learned counsel for the respondent contended that the petitioner has only a right of consideration for promotion. Her case has been considered for promotion, but she was not found suitable for promotion to the higher post by the Departmental Promotion Committee.

11. This court will not sit as an appellate authority above the decision of the Departmental Promotion Committee adjudging the petitioner unsuitable for promotion. After taking into consideration the service record of the petitioner, the D.P.C. has adjudged her unsuitable. The petitioner has only given out that there were adverse remarks in her service record and that has also been given by an Officer who had biased against her, but she has concealed the other adversities in her service record as stated earlier. Even if the adverse remarks which are there against her, are excluded for consideration then on the basis of other two punishments she could have been adjudged unsuitable, and as such this court may not interfere in the matter.

12. I have given my thoughtful consideration to the submission made by the learned counsel for the parties. The petitioner became due for promotion from October, 1978 on the post of Under Secretary. Her case was put up to the Departmental Promotion Committee where the D.P.C. adjudged her suitability for promotion in its meeting held on October, 1978, November, 1979, August, 1980 and November, 1981, but she was not considered fit by the D.P.C. for putting her name in the select list of Under Secretary. The G.P.S.C. was also agreeable to the recommendations of the D.P.C. in the case of the petitioner. Lastly her case was considered for promotion in the meeting of the D.P.C. held on 10th March, 1983. At that time also, she was not found fit but the D.P.C. recommended that her case may be reviewed after one more

C.R. for the year 1982-83 is received. The Government has decided to include her name in the same select list of 10th March, 1983 after concurrence of the G.P.S.C for her inclusion in the provisional select list for Under Secretary. She was promoted as Under Secretary with effect from 1-7-1983. There is no dispute on these facts. The adverse remarks in the service record of the petitioner were there for the period from 1-9-1977 to 31-3-1978 and for the period from 1-4-1978 to 31-3-1979 and in view of these two adverse remarks the decision of the D.P.C. not to adjudge her suitable for promotion cannot be said to be illegal.

13. The counsel for the petitioner has challenged those remarks in this writ petition. The petitioner has prayed for expunction of those remarks also in this Special Civil Application. The petitioner has challenged the adverse remarks on the ground that the reporting and reviewing officer have not objectively made the assessment of the work of the petitioner. It has next been contended that the petitioner has not been given guidance and instruction about her lapses in discharge of duties before recording the adverse remarks. The remarks are vague and ambiguous. The Officer who has reported adversity against the petitioner was a biased person. Another ground has been raised that the petitioner's representation has been rejected by the reporting officer himself. It is mentioned in the reply that the representation filed by the petitioner was considered by the Secretary, Panchayat Housing and Urban Development Department and after considering the same it has been rejected. The representation has been rejected after considering all the points raised by the petitioner. The respondent has further stated that the confidential report of the petitioner for the period from 1st

September, 1977 to 31st March, 1978 were written by Shri M.D. Chhaniara, the then Under Secretary and reviewed by Shri T.H. Oza the then Deputy Secretary. She had not made the representation against adverse remarks within time. As regards the confidential report of the petitioner for the period from 1st April, 1978 to 31st March, 1979 is concerned, it is admitted by the respondent that the same were written by Shri B.P. Shelat, the then Under Secretary and reviewed by Shri K.V. Bhanujan, the then Dy. Secretary.

14. So far as the first remarks are concerned, the challenge has been made by the petitioner on the ground that Shri M.D. Chhaniara has spoiled her record. That has been challenged on the ground malafide, but the

petitioner has not impleaded Shri Chhaniara as a party to the petition. So far as other remarks are concerned, the challenge has been made by the petitioner on the ground that the reporting officer himself has rejected the representation which is not correct. The representation is rejected by the Secretary though after consulting the reporting officer and reviewing officer. At all stages, the petitioner has tried to conceal some fact or tried to make some false statement. It is a settled law that the challenged to the action on the ground of malafide of officer, the officer made the order is a necessary party and in the absence of the necessary party, the alleged malafides cannot be gone into. So challenge of the petitioner to the first adverse remarks on the ground of malafide is not sustainable. So far as the other ground of challenge of the adverse remarks is concerned, suffice is to say that the petitioner has not produce any material on record to show and establish that the remarks have been challenged by her on these ground in the representation. In case the petitioner has not raised this objection in the representation then she cannot be allowed to raise this objection before this court. The petitioner should have raised this object in the representation and should have taken the decision from the concerned authority which has not been done in the present case. Otherwise also this challenge to the adverse remarks of the petitioner is not of much importance. Even if it is assumed that those adverse remarks are to be expunged then also other adversities in the service record of the petitioner remain and on the basis of that, the decision of the D.P.C. not to adjudge her suitable for promotion is maintainable. It is settled law that even if after excluding some irrelevant material on the record, the decision of the authority can be based on the relevant material on the record, this court should not interfere in the matter, that is what exactly is the case here. The petitioner, as stated earlier, has concealed those two adversities which are substantial in nature and sufficient for her supersession even in the case where the criteria for promotion is seniority-cum-merit.

15. Now I may consider the objection raised by the learned counsel for the respondent that this writ petitioner deserves to be dismissed on the ground of concealment of material fact by the petitioner. It is a case where the petitioner has concealed the two facts that she was punished in departmental inquiry. Those two facts have a relevancy to the matter and the grounds which have been raised by the petitioner before this court in this Special Civil Application. The petitioner

was holding the post of Section Officer and she has not come up with the clean hands before this court. In case if those facts would have been disclosed then possibly this court would not have admitted the petition, as that material was sufficient for her supersession in the promotion. The petitioner by concealing this fact was able to get the order of the issue of rule in this case and also the interim relief. The litigant cannot be allowed to play hide and seek with the court and must approach the court candidly and with clean hands. In the recent decision, the Supreme Court in the case of Agricultural and Processed Food Products V/s. Oswal Agro Furane reported in 1996(4) SCC 297 held that suppression of the material fact is an abuse of the process of the court. The court in the aforesaid judgment in para no.29-30 held as under:

The facts as stated hereinabove,, on the other hand, show that the High Court ought not to have exercised its jurisdiction under Article 226 of the Constitution, for more than one reason, and, therefore, it would be incumbent upon this Court to interfere under Article 136 of the Constitution and not to allow Oswal Agro to take advantage of an obviously wrong decision of the High Court. Firstly the High Court misconstrued clause 15(j) of the order and held that because Oswal Agro was an export-oriented unit, therefore, it could export any item manufactured by it, which conclusion is wholly incorrect. Secondly the High Court ought not to have entertained the writ petition because of Oswal Agro's conduct. It had filed an earlier writ petition in the Punjab and Haryana High Court dealing with the same issue namely, its obligation and right to export its products under the licence and in terms of the Export (Control) Order. It is possible that the Delhi High Court may not be aware of the pendency of the writ petition in the Punjab and Haryana Court, regarding the export of edible rice bran oil, because there is no reference to the filing of the said case in the writ petition filed in the Delhi High Court. Oswal Agro is guilty of suppression of this very important fact. It was contended in the Punjab and Haryana High Court that it was under no obligation to export the edible rice bran oil and its only obligation was to export furfural while, in the writ petition filed in the Delhi High Court, a somewhat contrary contention was raised, namely, that

being an export-oriented unit, it was entitled to export non-basmati rice, in addition to furfural. Had Oswal Agro indicated in the writ petition filed in the Delhi High Court that it had also filed a petition in the Punjab and Haryana High Court which was still pending, relating to export of edible rice bran oil, then the Delhi High Court most probably would not have entertained the petition because the proper course which should have been followed by Oswal Agro was to raise this contention, regarding export of non-basmati rice, in the writ petition filed in the Punjab and Haryana High Court or to file a new petition there.

Under these circumstances, the exercise of jurisdiction under Article 136 of the Constitution is clearly called for, more so when it is admitted that the respondent had exported over 87,000 MT of non-basmati rice at a price far less than the minimum price fixed by the appellant.

A reference may also have to the decision of the Supreme Court in the case of Ramjash Foundation Vs. Union of India reported in 1993 Supplementary Volume II S.C.C. Page 20 wherein the Supreme Court has held as follows:

It is well settled that a person invoking an equitable extraordinary jurisdiction of this Court under Article 226 of the Constitution is required to come with clean hands and should not conceal the material facts.

A reference may also have to the decision of the Madras High Court in the case of T. Subramania Chettiar vs. D.S.Officer reported in A.I.R. 1995 Madras Page, 50 and in the case of A.N. Segal vs. Rajaram Sheoran reported in JT 1995 (2) S.C. 664 the Supreme Court held that in a case where the petitioner obtained favourable order by suppression of material fact and by making false representation is a case of contempt of court and notice was issued.

16. In this case the petitioner has made the suppression of fact and those were the material facts and had a strong bearing and relevancy to the claim made in this writ petition, and as such, this writ petition deserves to be dismissed on this ground also.

17. As the writ petition deserves to be dismissed on the aforesaid ground, I do not consider it necessary to go on the other claim of the petitioner regarding the crossing of efficiency bar from 1-10-1976.

18. In the result, this Sp. Civil Application fails and the same is dismissed with costs. Rule discharged. Interim relief granted by this Court stands vacated. The petitioner is directed to pay Rs.2000/- by way of costs of this writ petition to the respondent.

zgs/-